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Race Segregation Ordinance Invalid

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RACE SEGREGATION ORDINANCE INVALID. — The opinion in *Buchanan* v. *Warley*[1] reflects the confusion and difficulty of that troublesome prob-

[1] October Term, 1917, No. 33.

lem, the place of the negro race in the United States, with which the case and the segregation ordinance of Louisville discussed therein are essentially concerned. The decision by a unanimous court reverses the holding of the Kentucky Court of Appeals,[2] and declares that the ordinance violates the Fourteenth Amendment. This result is reached by one of those anomalous and objectionable devices which characterize our methods of solving fundamental constitutional questions. The case arose upon a bill for specific performance of a contract, whereby the plaintiff, a white man, agreed to sell, and defendant, a colored man, agreed to buy certain real estate situated in a block in which the majority of houses were occupied by white people. The defense was based upon a provision of the contract to the effect that the purchaser should not be required to perform unless he had "the right under the laws of the State of Kentucky and the City of Louisville to occupy said property as a residence," and upon the ordinance above referred to.

That ordinance, approved May 11, 1914, in effect prohibits any colored person to move into and occupy, as a residence, or to establish and maintain as a place of public assembly, any house upon any block upon which a greater number of houses are occupied for such purposes by white people than by colored people. Another section contains the converse of this prohibition; and by still another the location of residences and of places of assembly made, and the continued occupancy of such premises begun by white or colored persons, prior to the approval of the ordinance, are expressly excepted from the scope and effect thereof. It would be difficult to frame an ordinance which should accomplish any measure of segregation, with more restricted scope or less effect upon property rights than this one. If the present decision shall stand, therefore, it would seem that race segregation by legal compulsion, at least in cities, must be abandoned as a vain effort.

Doubtless this is a desirable result to reach. Quite possibly, if indeed not probably, race segregation of the block or "checker-board"[3] type would aggravate the very evil which its sponsors aim to cure. Be that as it may, it is difficult to feel convinced that the result has been reached by sound canons of judicial review. It is apparent that the primary, the real, interests involved in the ordinance are certain civil rights of the negro race guaranteed by the Fourteenth Amendment, and yet that the invalidity of the ordinance was determined professedly solely with reference to the property right of a white man. Here is an ordinance embodying a policy of immense potential importance to the negro race, which in terms treats both races alike, but which it requires no argument to show, in fact discriminates heavily against the negro;[4] and yet we are treated to the strange and disquieting spectacle of having the argument against the validity of the ordinance presented only by a white man, while a negro stands forth as its only proponent. True, as the ordinance was declared unconstitutional, the negro race cannot complain of the result. True, also, that the Supreme Court, under settled rules of practice, had no choice but to pass upon the one issue legally presented to it;

[2] 165 Ky. 559, 177 S. W. 472.
[3] See THE NEW REPUBLIC, December 8, 1917, an article on the South African situation.
[4] See 27 HARV. L. REV. 270.

namely, as to whether the ordinance, if enforced, would deprive the white plaintiff of rights guaranteed by the Fourteenth Amendment. This criticism is directed not at the result reached in this particular instance, nor at the Supreme Court for following a long-established rule of practice in constitutional cases, but rather at that rule or system which permits of the entertaining and determination of legal and political questions of the most profound importance to the entire country, upon such a casual, oblique and unscientific presentation of the real interests involved.[5]

Conceding, however, that under established practice the court had no option but to pass upon the case as presented, can the reasoning of the court by which its decision is reached be reconciled, with the long settled principle that courts shall declare legislation invalid, only when its unconstitutionality is clear beyond any reasonable doubt? Though this principle has from the beginning of our constitutional history been constantly asserted,[6] courts have seemingly found it difficult to determine what is meant by it in application to particular cases, and it has not by any means always been adhered to.[7] The rule stated repeatedly and in various forms by the Supreme Court has perhaps never been more accurately expressed than by J. B. Thayer:[8] "It [the court] can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question. That is the test which they apply — not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it."

Had the instant case involved an act of Congress or even a statute of a state legislature, it scarcely could be contended that the court had observed this rule of caution, and it is at least doubtful if it gave sufficient weight to the presumption of validity attaching to the act of even such a subordinate legislative body as a city council. The Supreme Court has not formulated a scale by which to weigh the presumptions of validity attaching to the acts of Congress, of state legislatures and of subordinate legislative bodies respectively, but it may be conceded courts do, as a matter of practice and not without reason, attach somewhat less weight to the presumption of validity as to the acts of inferior officers and bodies than to those of coördinate rank. Nevertheless, if the subordinate legislature has authority to pass any act of this character, a strong presumption of its reasonableness arises,[9] and the opinion in the present case is

[5] This defect in our system by which important questions of constitutional law have frequently been decided upon the basis of subsidiary questions only is partially responsible for the recent agitation for that misconceived "reform" the "recall of judicial decisions."

[6] See THAYER, LEGAL ESSAYS, 13–19, for a citation of the earliest cases enunciating this rule.

[7] See address by Roscoe Pound, TRANSACTIONS, MARYLAND BAR ASSOC., 1909, 301, citing FREUND, 17 GREEN BAG, 416; DODDS, 24 POL. SCI. QUARTERLY, 193.

[8] *Id.* 21. See also for a most helpful analysis of the rule, COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 227–46.

[9] *In re* Anderson, 18 Cal. App. 593, 123 Pac. 972; *In re* Berry, 147 Cal. 523; Miller *v.* Birmingham, 151 Ala. 469; C. & Q. Ry. Co. *v.* Averill, 224 Ill. 516; State *v.* Trenton, 53 N. J. L. 132. See DILLON, MUNIC. CORP. (5 ed.) § 649.

not convincing in its effort to show that the doubtful element therein is anything other than its reasonableness. The court says: "its solution cannot be promoted by depriving citizens of their constitutional rights and privileges"; and again, "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

But the only constitutional right which the court holds is violated is that guaranteed by the Fourteenth Amendment, that property shall not be taken without due process of law, and the property taken in this case, according to the court, is that of the white plaintiff. The court does not hold that any right of the negro has been violated. The injury done to the white man consists of the restriction imposed by the ordinance upon the sale of property. But inasmuch as it has been held repeatedly that property may be taken or its use or disposition restricted for reasonable police purposes, it is apparent that in deciding a case upon the mere assertion that property has been taken without due process the court has come dangerously near to begging the whole question.

That question, then, is simply whether the taking of property by the ordinance was reasonable, and it is difficult to see on what basis the court, could have declared it so clearly lacking in reasonableness as to be unconstitutional. In the first place, the ordinance had already been declared reasonable and valid by the Kentucky Court of Appeals,[10] and very similar ordinances have been sustained in other states.[11] In all of the cases cited in notes 10 and 11 the segregation ordinances passed upon have been declared reasonable exercises of the police power, because they would tend to prevent race friction, disorder and violence. The ordinance in question recites that it is passed for this purpose. While opinions may well differ as to the efficacy and ultimate consequences of such measures, can it be said that there is no reasonable and appropriate relation between the end sought and the means adopted? The Supreme Court of the United States must find it difficult to say that there is no such relation, for it had already sustained state legislation requiring railway companies to provide in their coaches equal, but separate, accommodations for the two races,[12] and a state statute requiring the separation of the races in schools.[13] Many state courts have upheld similar legislation.[14] State courts have also sustained legislation forbidding the intermarriage between races.[15] There are three cases holding segregation ordinances invalid, but two of them are clearly distinguishable from the present case. In *State* v. *Gurry*, 121 Md. 534, such an ordinance was held invalid, but upon the express ground that it did not except from its operation rights of occupancy acquired before the ordinance was enacted.[16] In *State* v. *Darnell*, 166 N. C. 300, a similar ordinance,

[10] 165 Ky. 559, 177 S. W. 472.

[11] Ashland *v.* Coleman, 19 VA. LAW REG. 427; Harden *v.* Atlanta (Ga.), 93 S. E. 401; Hopkins *v.* Richmond, 117 Va. 692, 86 S. E. 139.

[12] Plessy *v.* Ferguson, 163 U. S. 537.

[13] Berea College Case, 211 U. S. 45.

[14] Roberts *v.* City of Boston, 5 Cush. (Mass.) 198; Lehew *v.* Brummell, 103 Mo. 546, 15 S. W. 765.

[15] State *v.* Gibson, 36 Ind. 389. *Cf.* Pace *v.* Alabama, 106 U. S. 583.

[16] Counsel for both parties admitted that there had been "more or less friction re-

but making no exception as to occupancy already established was declared invalid as exceeding the charter powers of the city council. In *Cary* v. *Atlanta*, 143 Ga. 192, the ordinance was declared invalid on the ground that it worked such a deprivation of property as to violate both the Federal and State constitutions.

In this view of the case it is difficult to resist the belief that perhaps the court's decision was in reality consciously or sub-consciously based upon the conviction that the restriction imposed by the ordinance upon the plaintiff's right to dispose of his property was not clearly unreasonable in relation to the possible benefit to the public welfare, but rather upon the feeling that the ordinance, while equal and reciprocal in phraseology, as regards the two races, does in reality, the facts of life being what they are, discriminate heavily against the negro race, and that the restrictions thus put upon its rights to acquire, use and sell property with all the consequences entailed are altogether greater than any possible good to be derived by the general public therefrom. Possibly the court foresees that the line has now been reached where the dangers suggested by Justice Harlan in his strong dissenting opinion in the Civil Rights Cases, 109 U. S. 3, has been reached.[17] The court may have felt that even conceding that the ordinance, if sustained, might tend to prevent conflicts between individuals or small groups from the two races, its ultimate effect in building up wholly black and wholly white communities in the same city would almost certainly produce far greater and more menacing conflicts than those which the present ordinance is supposed to prevent.

It may well be that by a process of unexpressed reasoning, the court has reached a sound result in this case; but clearly the real question involved ought to be settled only after careful consideration of the *facts*, as to the effect of propinquity and intermingling of the races. Perhaps there is sufficient danger in such contacts as to justify this legislation, perhaps not. It is regrettable that the whole problem could not have been brought before the court, by the aid of briefs such as those filed by Mr. Brandeis and Professor Frankfurter in the Oregon cases.[18]

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sulting from the occupancy by colored people of houses in blocks theretofore occupied wholly by white people." "With this acknowledgment," says the court, "how can it be contended that the City Council, charged with looking to the welfare of the city, is seeking to make an unreasonable use of the police power, when it enacts a law which, in their opinion, will tend to prevent the conflict?" See page 547 of the opinion.

[17] *Cf.* McCabe *v.* Atchison, etc. Ry. Co. 235 U. S. 151.

[18] Muller *v.* Oregon, 208 U. S. 412; Stettler *v.* O'Hara, 243 U. S. 629. As to the importance of presenting scientific and dependable data bearing upon the facts and conditions affected by legislation regulating social and industrial relationships, see the following articles: "Hours of Labor and Realism in Constitutional Law," by Felix Frankfurter, 29 HARV. L. REV. 353; "Limitation of Hours of Labor and the Federal Supreme Court," by Ernst Freund, 17 GREEN BAG, 411; "Due Process, the Inarticulate Major Premise and the Adamson Law," by Albert M. Kales, 26 YALE LAW J. 519; "Liberty of Contract," by Roscoe Pound, 18 YALE LAW J. 454.